IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE RAYMOND CORTEZ,
Appellant.

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,703

On Appeal From the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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For the District of Arizona

RUBIN SALTER JR.
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II.
ISSUES OF THE CASE

Under statute 21 U.S.C. §174 providing that unexplained possession of narcotic drugs shall be sufficient to sustain a conviction for concealment of illegally imported drugs, possession may be actual or constructive and it need not be exclusive, but may be joint. The jury was properly instructed as to the law on "possession," common scheme and the inferences that may be drawn from 21 U.S.C. §174.

There was a proper denial of the motion for a mistrial based upon the prosecution's use of co-defendant Young's statement. There was ample evidence independent of co-defendant Young's statement to convict Cortez. Co-defendant Young's statement was voluntary.

III.
JURISDICTIONAL STATEMENT OF FACTS

The Government accepts the Appellant's Jurisdictional Statement of Facts with the following additions. On November 8, 1967, an Indictment was filed in the United States District Court for the District of Arizona, charging Joe Raymond Cortez, Anthony Lewis and Sandra Young with receiving, concealing and facilitating the transportation of 29.7 grams of Heroin in violation of 21 U.S.C. §174. The defendant filed Notice of Appeal from Judgment and Commitment, entered on January 8, 1968.

Jurisdiction in the District Court rested on 18 U.S.C. §3231, and rests in this Court on 28 U.S.C. §1291 and §1294.

The Reporter's Transcript of Testimony at trial will be referred to as "RT," and the number following "RT" will refer to the page, and the number following "L" will refer

to the line of the page. Appellant Cortez will be referred to as Defendant or Cortez. The other persons named in the Indictment will be referred to as passengers or by their respective names.

Defendant Anthony Lewis was not tried at the same time Cortez and Young were. Defendant Young has not appealed from the Judgment and Commitment.

Statement of Facts

At approximately 12:10 a.m. on the 19th of October, Joe Raymond Cortez, Sandra Young and Anthony Lewis entered the United States from Mexico in a 1959 Cadillac, with Cortez driving, at the Port of Entry, Nogales, Arizona (RT 26-27). Each of the occupants made a negative declaration as to any merchandise they may have been bringing from Mexico. Customs Port Investigator Marron had a call placed to customs officers for surveillance of the Cadillac. Customs Agent Hugh Marshall responded and observed the car at the Port of Entry (RT 124). After taking a rather circuitous route through the city of Nogales, Arizona, the 1959 Cadillac with Defendant Cortez driving, finally headed north on U.S. Highway 89 where it was stopped by customs agents (RT 131). At approximately 2:00 a.m. the defendants were stopped at Mile Post 6 and their vehicle was searched with negative results. The three defendants were returned to the customs office and a personal search was also negative. They were released and left the office at approximately 3:00 a.m.

At 3:15 a.m., Highway Patrolman Gordon F. Hopke stopped the defendants northbound on U.S. Highway 89 at Mile Post 26.4, and issued defendant Cortez a speeding citation (RT 32), then observed the defendants to leave northbound. A short time later, Hopke saw the defendant's vehicle southbound, and followed them to the location where he

had previously stopped them, and observed Cortez stop and begin walking the road shoulder, apparently looking for something. Patrolman Hopke stopped, and was advised by defendant Cortez that he was having battery trouble. The defendants left, driving south, but again they were observed to return to the area driving slowly.

Hopke advised Customs Agent Dennis of the situation, and met Dennis at 4:45 a.m. to show him the location where the defendants appeared to be searching. Customs Agent Dennis with Customs Agent Marshall at 5:25 a.m. searched the road shoulder location. At Mile Post 26.4 customs agents found a contraceptive containing Heroin, lying about a foot to the left of U.S. Highway 89 (RT 77). A surveillance was maintained at the area and at approximately 8:00 a.m. the defendant's vehicle was observed to approach the area from the south and stop fifty feet north of Mile Post 26.4. Cortez was driving and Lewis was in the back seat, with the right door open, looking down at the road shoulder (RT 79-80). Lewis instructed Cortez to back up. Cortez backed up approximately 100 feet, stopped the car, and got out and started looking under some nearby mesquite trees (RT 83). The defendant Lewis walked to the Heroin and picked it up and began walking toward the vehicle (RT 84). At this time all three defendants were arrested. The trial proceeded against Appellant Cortez and defendant Sandra Young, who is not a party to this appeal.

IV.
SUMMARY OF ARGUMENT

1. The Court did not commit plain error in instructing the jury.

2. The Court did not err in denying Defendant's motion for a mistrial based on the statement of a co-defendant.

3. Defendant Young's statements were volunteered and not the product of any interrogation by a Government officer.

V.
ARGUMENT

1. The Court did not commit plain error in instructing the jury.

Based upon the state of the evidence, the Court properly instructed the jury upon the presumption provided for by 21 U.S.C. §174, as well as to the effect of the acts of one who is a member of a common plan (RT 280 and RT 278-279). Joint possession can be shown by evidence of a joint venture, friendship, and general conduct. *Eason vs. United States* (9th Cir., 1960) 281 F.2d 818. Possession can be established by circumstantial evidence. *Covarrubias vs. United States* (9th Cir., 1959) 272 F.2d 352. Actions of each defendant were admissible against other defendant even though indictment did not charge defendant with conspiracy, aiding and abetting, nor concerted action. *United States vs. Messina* (2nd Cir., 1968) 388 F.2d 393.

In *Jefferson vs. United States* (9th Cir., 1965), 340 F.2d 193, at page 196, quoting earlier Circuit opinions this Court said:

> "'We early held that "possession" of narcotic drugs sufficient to support the inference of guilt under the statute meant "having [the narcotic drugs] in one's control or under one's dominion." Mullaney v. United States, 82 F.2d 638, 642 (9th Cir., 1936), and we have recently re-examined and re-affirmed this basic position. Rodella v. United States, 286 F.2d 306 (9th Cir., 1960), cert. denied 365 U.S. 889, 81 S.Ct. 1042, 6 L.Ed.2d 199. As the Rodella opinion and the authorities which it cites amply demonstrate, it follows from this definition of "possession" in Section 174 that so long as the evidence

establishes the requisite power in the defendant to control the narcotic drugs, it is immaterial that they may not be within the defendant's immediate physical custody, or, indeed, that they may be physically in the hands of third persons—"possession" as used in this statute includes both actual and constructive possession. The power to control an object may be shared with others, and hence "possession" for the purposes of Section 174 need not be exclusive, but may be joint. Moreover, like other facts relevant to guilt, "possession," actual or constructive, may be proven by circumstantial evidence. We have not hestitated to uphold convictions under Section 174 wherever either actual or constructive possession by the defendant could be honestly, fairly and conscientiously inferred. This interpretation of the statute, equating the term "possession" with dominion and control, and permitting proof of dominion and control by circumstantial evidence, has been adopted in other circuits as well.' (Footnotes omitted.)"

This Court as recently as July 22, 1968, had an occasion to consider the presumption set forth in Title 21 U.S.C. §174 and decided that the statutory presumption does not amount to a deprivation of constitutional rights. *Sanchez vs. United States,* Cause #22,584 (July 22, 1968, 9th Cir.). For these reasons the Government asserts that it was not plain error to give this instruction.

2. The Court did not err in denying Defendant's motion for a mistrial based on the statement of a co-defendant.

The Government feels that in actuality the Appellant is raising the issue whether the conviction of a defendant at a joint trial should be set aside where a co-defendant's incriminating statements inculpated the Appellant. In the case at bar neither Cortez or co-defendant Young took the stand at the trial. The Supreme Court last considered this point in *Bruton vs. Supreme Court of the United States.* No. 705, October Term, 1967 (May 20, 1968).

Agent Rollin B. Klink who rode back to Nogales, Arizona, with defendant Young, after she had been advised of her constitutional rights, testified that:

> ". . . I said: 'We have been watching you since early this morning.' To which she replied: 'I told them something was going to go wrong, I just had that feeling.' " (RT 184).

The trial court admonished the jury that, "It will not be considered so far as the defendant Cortez is concerned and you will eliminate it from your consideration." (RT 184, L 9-11) This limiting instruction was proper under *Delli Paoli vs. United States,* 352 U.S. 232. The Government is aware that *Bruton* was made retroactive by *Roberts vs. Russell,* 36 L.W. 4447 (June 10, 1968).

The Government believes that the issue at bar can be distinguished from a *Bruton,* supra, situation on the facts for the following reason.

The extrajudicial statement does not refer to the non-declaration in a direct incriminating fashion. There was ample independent evidence as to the actions and conduct of Appellant Cortez from which the jury could have based its decision upon in arriving at a verdict. The use of the personal pronoun "them" didn't really add anything to the evidence against the non-declarant Cortez. Finally, the conviction is not dependent upon the statement of Miss Young.

The Court in *Bruton* emphasized that in many "cases a jury can and will follow the trial judge's instructions to disregard" inadmissible evidence as to a particular defendant (Slip opinion 12-13). The court found only that the risk that the jury would not do so is too great to take "where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury." (Slip opinion 13). There is not even a claim that the Government deliberately caused

a very ambiguous at most statement of a co-defendant to be spread before the jury. Where the statement does not directly incriminate the co-defendant, the dangers found in *Bruton* are much less great and should not vitiate the conviction. It necessarily follows that if the statement did not incriminate Appellant there was no need for a mistrial. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak vs. United States*, 344 U.S. 604, 619.

3. Defendant Young's statements were volunteered and not the product of any interrogation by a Government officer.

Customs Agent Dennis in a hearing outside the presence of the jury testified that he advised the defendants as to their constitutional rights as interpreted by *Miranda vs. Arizona*, 384 U.S. 436 (RT 170-173), The Court found that from the instructions given her by Agent Dennis, Co-defendant Young did understand her rights and, further, any statements she made were voluntary since there was no interrogation (RT 181, L 6-23). Volunteered statements of a defendant are admissible after he had been given the full warning required by *Miranda*. *Deck vs. United States*, 395 F.2d 89 (9th Cir., 1968).

VI.
CONCLUSION

It is respectfully submitted that the jury was properly instructed as to possession of a narcotic by a defendant and the presumptions that are permissible under 21 U.S.C. §174. There is enough circumstantial evidence of Appellant Cortez's possession to say that to give the instruction objected to is not plain error. The statement of the co-defendant Young as to the non-declarant Appellant, did not directly incriminate him, thus requiring the conviction to be set aside. If this be

so, there was no grounds for a mistrial and the Court did not abuse its discretion. Any statements made by co-defendant Young were not the product of any interrogation but were voluntary.

Respectfully submitted,

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